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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 655

C. H. ACKER, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, HENRY A. WALLACE, SECRETARY OF AGRICULTURE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING.

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Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the Appellants and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

This cause was decided May 18, 1936. It involves maximum commission rates fixed by the Secretary of Agriculture and to be charged by certain market agencies at the Union Stock Yards, Chicago, Illinois, for the buying and selling of livestock.

1. The Court states in its opinion that

"the Secretary was not bound to, and indeed he could not, adopt any one agency's costs or an average of the

costs of all of them; to do so would be to leave out of consideration relative size, relative volume, and relative efficiency of individual agencies."

This is true; but it does not seem to meet the problem presented by the record. In addition to the inequalities between agencies mentioned, there are many other inequalities,—such as differences in number of head of livestock in consignments and in drafts. There are differences in many other factors. The question is not one of average costs, though average costs may be a helpful tool of inquiry. The question is: Can a rate be fair when, with no proof of inefficiency as to any market agency, each with its own distinctive particular experience, the Secretary's cost allowance for each species is lower than that of *any* agency save as now noted?

In respect to cattle and calves, the Secretary's total cost allowance per head is $.4297. According to the Secretary's own determinations of actual cost shown by Government Exhibit No. 49, pages 7 to 9, all agencies but four had higher expenses for the year considered,—that is, 1932. For swine, the Secretary's allowance of total costs per head is $.1323. The same Government Exhibit, pages 10 to 12, shows that all but three firms had higher expenses. In respect to sheep, the Secretary's allowed cost is $.0485 per head. The same Government Exhibit, pages 13 to 15, shows that no firm attained this low cost. The four cattle firms and the three among the firms dealing in swine, have been so negligible in the particular species that it can be fairly said that no firm reached the low total per head cost fixed by the Secretary—and all of this on the Secretary's own showing as to the actual cost, leaving out facts proved by the Appellants that make the actual costs even higher. Thus it is clear that whether or not the Secretary should have taken average total cost per head of a single firm, of a selected plurality of firms, or all firms,—and quite

irrespective of any method or plurality of methods that might have been employed—*he should not have disregarded the undisputed facts respecting actual costs as to every firm at the Chicago Union Stock Yards.*

2. The most important item of costs is salesmen's salaries. The Court's opinion states that—

> "The attack upon the allowance for salesmen's salaries is bottomed on the fact that the Secretary refused to adopt an average of salaries heretofore paid. He was not required so to do. What is a typical salesman's performance, and a fair recompense for it, is a matter of judgment based upon all the facts."

The attack is bottomed deeper than this. It is not merely a question of averages. The Secretary's "informed judgment" should, of course, be grounded on facts. The Secretary fixed a potential performance of selling cattle and calves at 1,000 cars per annum per salesman. In 1932, of more than one hundred firms selling cattle and calves, only two reached that average. In respect to swine, the Secretary's imaginary salesman was required to sell 1060 cars per year. Not a single salesman attained this, in fact. The Secretary's postulated sheep salesman was required to sell 1035 carloads per year. Only two attained this, in fact. The two firms selling cattle and calves reaching the Secretary's demand as to quantity sold, had large consignments, large drafts and few truck deliveries. On these facts can the Secretary's ideal sales performance be justified? If it were a question of averages, the postulated salesman's performance as to numbers sold must be two and one-half times that of actuality, respecting cattle; two and three-quarters times, respecting hogs; and over two times respecting sheep. But, of course, the question of average performance is not determinative. The fact that the real salesmen who are not shown to be dishonest, slackers or inefficient (the contrary appears) failed to attain the Secretary's ideal, is the important consideration. The Secre-

tary associated these postulated performances of ideal salesmen with certain salaries. The salaries were not based on any proved experience. It is no answer to say that the Secretary's disregard of simple arithmetic is explainable as "the exercise of judgment." For cattle salesmen these associated salaries fixed by the Secretary were $4500 per annum; for swine, $3600 per annum; and for sheep, $4,000 per annum. It is pure fiat to say that competent salesmen to be trusted with their important work are obtainable at such wages on the basis of actual selling performance as to numbers (by no means a highly important factor), to say nothing of associating such salaries with the selling of numbers greatly multiplied. Numbers, of course, are easily attainable by one not really giving service and acting as a mere acceptor of any offer made by packers or other buyers.

The situation in the instant case is quite different from that of the *Tagg* case. If the Court's action there in fixing salesmen's salaries on the basis of the highest salaries in fact paid can be said to be a principle, then the Secretary's action here, both in respect to salaries and associated postulated performance in numbers, cannot be said to be an application of the same principle.

In the foregoing we have ignored the fact that many salesmen owners receive no salaries. We have ignored the fact that fifty-six of the one hundred and ninety-three owners did not carry themselves on the books at any salary, and that some other owners had nominal salaries or drawing accounts. Appellants, of course, do not propose, and have not proposed, that the owner who receives fair compensation for services performed by him should receive more through choice of names for that compensation. The Secretary should have, of course, refused "to load the business with a cost having no relation to actualities"; but he also should have refused to disregard the fact that in

so many instances owner salesmen were receiving little or no compensation in any form. It was an actuality that these men did their work and that they were not paid for it—and not a mere hypothesis. However, assuming, for the sake of argument, that the owner salesmen who did not credit themselves on their books with reasonable salesmen salaries for work done, are unworthy of compensation, the Secretary's action still is factually ungrounded, as we have endeavored to point out. Further, in respect to salesmen's salaries, the Secretary did recognize in words that facts count. On page 137 of the record, among his findings, the Secretary said:

> "The prices at which such services are bought and sold are generally regarded as the proper test to be applied."

This test, however, received no more than lip service. Of course, the right of the employers and the employee salesmen to bargain for their hire, individually or collectively, is fundamental. True, Acts passed under the Interstate Commerce Clause and public interest have their bearings upon this right; but here there is nothing to indicate that salesmen as efficient, experienced, skilled and as trusted and trustworthy, with the interests of growers and shippers of livestock, can be procured for less. That salesmen with the training and possessing the qualifications that the Secretary sets forth on page 100 of the record, can be procured at a lesser cost than the market agencies are required to meet in bargaining for services, individually and collectively, does not appear. Further, the announced test—that is, the prices at which such services are bought and sold, where no fraud or unfairness appears, would seem to be the only practical feasible one. Compare *Adkins* v. *Children's Hospital*, 261 U. S. 525, 560.

3. The opinion states:

> "The amended petition was filed about three months after the original order was issued. It is inconceivable

> that economic conditions had so altered in this brief period as to demonstrate that the new schedule of rates, if just when promulgated, had become unjust and oppressive."

Petitioners' Exhibit 12 (Senate Document 140, 73 Cong. Second Session, Emergency Hog Marketing Program, p. 40) issued one week after the entry of the Secretary's Order shows that within a short space of time prior to January 15, 1934, when the publication was issued, 6,410,866 pigs, sows, and inedible little pigs had been destroyed as a result of the emergency hog marketing program. The Secretary knew the extent of the destruction of the commodities in which the petitioners' deal; but the petitioners had no means of knowing the extent of the destruction until the publication of the Senate document referred to.

The same reference, page 42, states:

> "the sales of each sow * * * removed from fall farrowings approximately five pigs which, under normal circumstances, are fed to an average market weight of about 225 pounds".

It is further stated that the reduction up to January 15, 1934, as a result of the program was in the neighborhood of 1,000,000,000 to 1,200,000,000 pounds.

With the reduction in the supply of livestock, the commission men knew the results which would immediately follow; that they did follow is shown by the petitioners' exhibits in the District Court (R. 259-296). Even now the aggregate supply of meat animals is the smallest in more than 30 years (Misc. Publication No. 235, U. S. Department of Agriculture, Nov. 1935, p. 53).

4. On the question of confiscation, it is true that relatively little tangible property is employed in the business. As the Court's opinion states, the Appellants render a personal service. We take it that this affords no distinction from the principles applicable when tangible properties of

large values are embarked in a public service. The right to serve those who will employ them is a property right inherent in the market agencies. The right of the employee to make and enforce contracts is a property right. It would seem that when rates are insufficient to yield the fair value of a service, they are confiscatory and deprive the giver of personal service of property without due process of law, and deny him equal protection of the law. The showing upon this was made in the District Court on final hearing.

From this evidence it appears that without taking into consideration any salary adjustment whether or not the owners drew a salary or made a profit or neither, only 2 firms would have made a profit in 1932 under the Secretary's rates, and only 5 in 1933 (Exhibit 2, R. p. 270 and 272). The evidence of the effect of the Secretary's Order upon the business of the Appellants is found in exhibit form from pages 256 to 292 of the record, and the testimony respecting it at pages 212 to 257. Exhibit 10 (R. p. 295) is particularly pertinent. It shows that even if small volume firms charged by the Secretary to be inefficient, were eliminated from the market and their business distributed without additional costs to the remaining firms, there would be no substantial effect on costs or on profit.

5. The orders of the Secretary apply both to selling charges and buying charges. The only finding made by the Secretary in respect to the costs of buying service is that they may be more or less than the cost of selling (R. Vol. I, p. 181). Upon this general finding the Secretary ordered that the rates for buying live stock shall not be in excess of those for selling like species. Hence there is nothing in the Secretary's findings upon which to base his order of unreasonableness of existing rates for buying; or his order that charges for buying services should not exceed those

for selling. The Court's opinion seems to wholly overlook this.

For the reasons given, it is urged that a rehearing be granted.

Respectfully submitted,

GEO. I. HAIGHT,
Counsel for Petitioners.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

GEO. I. HAIGHT,
Counsel for Petitioners.